IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12-12-2007

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

W.P.No.8285 of 2007
and
MP Nos.2 and 3 of 2007

1.K.Ramesh
2.G.Aravamuthan
3.K.Kumar
4.S.Vijayaraghavan
5.M.Senthilkumar
6.K.Varadharaju
7.C.K.Subramani
8.R.Parthasarathy
9.G.Ravichandran
10.T.Srinivasagan .. Petitioners

vs

1.State of Tamil Nadu,
rep. By its Secretary to
Government
Health & Family Welfare
Department
Secretariat, Chennai 9.
2.Director of Public Health and
Preventive Medicine
Chennai 6.
3.G.Gayathri
4.M.Suresh
5.B.Jothi
6.P.Senthilkumar
7.P.Raja
8.Indra Priyadharshini
9.J.Tamilarasan
10.S.Muralitharan
11.R.Sangeetha
12.R.Nirmala
13.P.Balakrishnan
14.R.Selvarasu
15.M.Suresh
16.J.Nagabanu
17.S.Gomathi
18.M.Murugesan
19.S.Rajeswari
(RR13 to 19 impleaded as
per order dated 25.7.2007
in MP No.4/2007) .. Respondents

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Writ petition filed under Article 226 of the Constitution of India praying for a writ of Certiorarified Mandamus to call for the records pertaining to the order passed by the first respondent in G.O.(D) No.1127, Health & Family Welfare Department, Dated 30.10.2006 and quash the same insofar as it directs to give posting on completion of 3 months condensed training course to the respondents 3 to 17 in para 7 of the order, and direct the respondents 1 to 2 to fill up the post of Ophthalmic Assistant according to employment exchange seniority.

For Petitioners : Mr.S.Mani

For Respondents : Mr.S.Gopinathan
Additional Government
Pleader

Mr.Yasood Vardhan
Senior Counsel
for Mr.E.Girirajan
for RR3, 4, 6 and 8 to 12

Mr.V.Venkatasamy
for R13 to 19

RR5 & 7 - Not ready

ORDER

By consent of parties, the writ petition itself is taken up for consideration.

2.The petitioners 10 in number, have sought for a writ of certiorarified mandamus to quash the G.O. made by the first respondent in G.O.(D) No.1127, Health & Family Welfare Department, dated 30.10.2006, and to direct the respondents 1 to 2 to fill up the post of Ophthalmic Assistant according to the employment exchange seniority.

3.The affidavit in support of the petition and also the counter affidavits filed by the contesting respondents, including the newly added respondents, are perused. The Court heard the learned Counsel on either side.

4.The writ petition came to be filed under the following facts and circumstances:

The petitioners underwent the Para Medical Course of Diploma in Optometry with two years duration in the Regional Institute of Ophthalmology, Government Ophthalmic Hospital, Egmore. They have also undergone three months condensed training course. The Government allotted private hospitals also to institute the Diploma in Optometry. Accordingly, Sri Gokulam Institute of Para

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Medical Sciences, Salem, instituted the said diploma course for two years, and the course was started in 1996. The students underwent two years diploma course, and they did not have the three months condensed training course as the private institute did not provide to them. The Government amended the special rules for the post of Ophthalmic Assistant in 1998, and as per the amended rules, the students who had the diploma from Government institutions and the condensed 3 months training course thereon alone were made eligible for appointment to the post of Ophthalmic Assistant. In the amendment, they introduced three months condensed training course as also one of the requirements. On the basis of the above amendment, the students who underwent the diploma in Optometry in private institutions, were not given the condensed course of three months training. Therefore, 15 of those students, including the contesting respondents 3 to 12 herein, filed O.A.No.7723 of 1999 on the file of the Tamil Nadu Administrative Tribunal, Madras, wherein they ventilated their grievance that they were made ineligible to get the post of Ophthalmic Assistant. The orders came to be passed by the Tribunal, following which the rules have not yet been amended. Even as per the order passed by the Tribunal, though the petitioners therein were also to be absorbed for the post of Ophthalmic Assistant, the petitioners before this Court while filling up the vacancy, must be given seniority. While the matter stood thus, the impugned G.O. came to be passed wherein a direction was given to the Director of Public Health and Preventive Medicine, the second respondent herein, to relax the rules thereby the respondents 3 to 12 herein were to be absorbed as Ophthalmic Assistants by giving seniority. Under such circumstances, the said G.O. has got to be struck down, and necessary directions be given to the State.

5.Advancing his arguments on behalf of the petitioners, the learned Counsel would submit that these petitioners have undergone the training which is necessary for the post of Ophthalmic Assistant; that the respondents 3 to 12, who had the diploma course, underwent the course in Sri Gokulam Institute of Para Medical Sciences, Salem; that they also challenged before the Tribunal that they should also be given opportunity and absorbed by the State as Ophthalmic Assistants; that while the said O.A. was taken up for consideration by the Tribunal, the petitioners herein who were the parties therein, put forth their respective contentions, and the Government was also a party; that an order came to be passed by the Tribunal in O.A.No.7723/99 after considering the contentions on merits of the matter; that as could be seen from the order of the Tribunal, though the petitioners herein who have undergone the training, the respondents 3 to 12 herein were eligible to become Ophthalmic Assistants, and the Government could consider and relax the rules; but, at the same time, while giving the appointment, the petitioners herein who have undergone the training under the Government Institution, must be given seniority, and only then, the case of the respondents 3 to 12 should be considered; that the order passed by the Tribunal in O.A.No.7723 of 1999, remains

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intact not challenged by the respondents 3 to 12 or by the State; that now, at this juncture, the impugned G.O. came to be passed wherein a direction was given to the second respondent to relax the rules in order to absorb the respondents 3 to 12 as Ophthalmic Assistants; that if it is allowed, it would be repugnant and contrary to the orders passed by the Tribunal, and the petitioners will lose their seniority; that they should be given seniority as per the orders of the Tribunal, and under the circumstances, if it is allowed, it would cause prejudice to their rights.

6.Added further the learned Counsel that at this juncture, it is to be pointed out that the Rules have not been relaxed yet; but, a direction has been given for the relaxation of the rules; that if the relaxation of the rules has got to be ordered, it should be in the line of the orders passed by the Tribunal in O.A.No.7723 of 1999, but not done so; that so long as the G.O. passed by the State is repugnant to the orders of the Tribunal, the G.O. has got to be struck down, and necessary directions be given to the State.

7.Contrary to the above contentions, the learned Additional Government Pleader would submit that the petitioners have claimed that their cases may be considered for the post of Ophthalmic Assistant as they have completed three months additional training permitted by the Government; but, the adhoc rules prescribed for the post of Ophthalmic Assistant, do not permit to consider them as Ophthalmic Assistants; that the executive instructions given by the Government in G.O.Ms.No.662, Health and Family Welfare Department, dated 9.12.1998, for providing additional training, cannot override the rules prescribed for the post of Ophthalmic Assistant; that as there are vacancies in the post of Refractionist (Optometrician) in both the Directorate of Medical Education and Directorate of Medical and Rural Health Services (Director of Medical Education – 5 vacancies and Director of Medical and Rural Health Services – 16 vacancies) the cases of the petitioners can be considered for the above vacancies, since they are qualified as per rules for the post of Refractionist who are Optometricians; that even the respondents 3 to 12 have not been given appointment so far, and under the circumstances, the writ petition has got to be dismissed.

8.The learned Senior Counsel for the respondents 3, 4, 6 and 8 to 12 and the learned Counsel for the respondents 13 to 19 would submit that it is true that an order came to be passed in O.A.No.7723 of 1999; that the respondents 3 to 12 herein were the petitioners in that O.A.; that these respondents have undergone the training before Sri Gokulam Institute of Para Medical Sciences, Salem; that since they were not made eligible, an occasion arose for them to challenge the same; that there was a specific direction given to the State to relax the rules and to absorb them as Ophthalmic Assistants; but, the Government have not relaxed the rules so far; that as far as the petitioners are concerned, they are only Optometricians; that they have undergone

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the course of Optometry; that under the circumstances, they cannot claim any eligibility for the post of Ophthalmic Assistant; that a very reading of the order of the Tribunal in the O.A. would indicate that the merit and necessary qualification were not considered by the Tribunal; that even if the petitioners have undergone three months condensed training course, it would not satisfy the requirements; that as per the requirement for the post of Ophthalmic Assistant, these respondents have undergone that course; but, the petitioners who are only Optometricians, could not have the necessary qualification even though they have undergone three months condensed training course; that under the circumstances, the matter was not considered originally by the Tribunal; that now, there was a direction given to the State to relax the rules in order to absorb the petitioners in the O.A., who are the respondents 3 to 12 herein, for the post of Ophthalmic Assistant; that under the circumstances, no question of quashing the G.O. would arise, and hence, the writ petition has got to be dismissed.

9.The Court paid its anxious consideration on the submissions made.

10.The petitioners herein have challenged the G.O. dated 30.10.2006. A perusal of the G.O. would indicate that there was a direction given to the Director of Public Health and Preventive Medicine to relax the rules and thereby to absorb the respondents 3 to 12 as Ophthalmic Assistants. It is not in controversy that the respondents 3 to 12 who actually underwent the course in Sri Gokulam Institute of Para Medical Sciences, Salem, were not originally considered eligible. In such circumstances, they filed O.A.No.7723 of 1999. A reading of the order of the Tribunal passed in the O.A., would clearly reveal that the petitioners and the State were also the respondents therein, and rival contentions were actually considered by the Tribunal. The Tribunal took the view that though the respondents 3 to 12 herein who were the petitioners therein, had undergone the training in the private institute, since it is recognised by the State, they are eligible to be appointed as Ophthalmic Assistants, provided they have undergone the three months condensed training course. It is not in controversy that the respondents 3 to 12 have also undergone the training, and they are eligible to be appointed as Ophthalmic Assistants as per the orders of the Tribunal in the O.A. But, at the same time, it is pertinent to point out that there was a direction given to the Government to relax the rules in such a way to absorb the respondents 3 to 12 as Ophthalmic Assistants. Till the G.O., what is now challenged, came to be passed, the rules have not been relaxed.

11.It remains to be stated that the Tribunal in the course of its order, has considered the contentions put forth by the petitioners herein, who were the respondents therein, and found that they have undergone the course in the Government Institute, and they are also eligible to be appointed, and since they have

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undergone the course early, while fixing the seniority for the post of Ophthalmic Assistant, they must be given priority. It would be more apt and appropriate to reproduce that portion of the order of the Tribunal in O.A.No.7723 of 1999 as follows:

> "12.We are not informed as to why the Government has not chosen to first appoint the persons who have successfully completed the refresher course in Government run colleges. In view of the fact that their course was funded by the Government and they are seniors to these applicants from private institute and that they also registered their names in the Employment Exchange long prior to the Sri Gokulam Institute of Para Medical Science candidates, they have already completed their refresher course also may be first appointed to the post of Ophthalmic Assistant and then the case of the candidates from Sri Gokulam Institute of Para Medical Science, Salem, shall be considered for which suitable relaxation of the rules may be made. All these applications are ordered in these terms."

12.From the very reading of the above order, it would be quite clear that these petitioners must be given priority while the seniority is fixed, and then only, the respondents 3 to 12 are to be absorbed as Ophthalmic Assistants. It is further to be pointed out that no one of either the petitioners or the respondents 3 to 12 has been appointed yet. While the matter stood thus, the impugned G.O.(D) No.1127, dated 30.12.2006, came to be passed. In the said G.O., no whisper is made about the relaxation of the rules, so that the petitioners could be absorbed or seniority to be given to them. On the contrary, it speaks only about the respondents 3 to 12 to be absorbed as Ophthalmic Assistants, and for that purpose, the rules have got to be relaxed.

13.Now, the contention put forth by the learned Additional Government Pleader that administrative instructions were given, and those administrative instructions could not override the rules which came into force under Article 309 of the Constitution, and under the circumstances, they need not be given effect or any legal consequence cannot be countenanced. This contention was never raised before the Tribunal. From the reading of the Tribunal's order, it would be quite clear that the rules have got to be relaxed in such a way to absorb the respondents 3 to 12 herein as Ophthalmic Assistants, and at the same time, while fixing the seniority, the petitioners herein must be given priority. It is also not in controversy that the order passed in the O.A. by the Tribunal, was never challenged by any one of the parties, and thus, it has got binding force on the parties. As on today, the G.O. what has been passed is only following the order of the Tribunal in the O.A. and that too, with regard to only one part. If the impugned G.O. is allowed to be given effect, then, it would be nothing but allowing the respondents 3 to 12 to be absorbed as Ophthalmic Assistants. If it is allowed to be done, it would be nothing but against the

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original order passed in the O.A.No.7723 of 1999 which is also placed in the hands of this Court. If the Government has to give effect to the order of the Tribunal in the O.A., then automatically it must be strictly followed in entirety. But, the Government has chosen to give a direction to the second respondent to relax the rules satisfying that part of the order and if done, it would be nothing but causing prejudice and hardship to the petitioners herein, which cannot be permitted. Under the circumstances, without any hesitation, the G.O. in question has got to be struck down. Accordingly, it is quashed. At the same time, a direction is given to the Government to consider the order originally passed in the O.A., which is in force, and relax the rules accordingly, so that the order in the O.A. is given effect in toto. Accordingly, this writ petition is ordered. No costs. Consequently, connected Mps are closed.

Nsv/

Sd/
Asst.Registrar

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Sub Asst.Registrar

To:

1.The Secretary to Government
State of Tamil Nadu,
Health & Family Welfare
Department
Secretariat, Chennai 9.

2.The Director of Public Health and
Preventive Medicine
Chennai 6.

- 2 ccs to Mr. S, Mani, Advocate SR No. 73934
- 1 cc to Mr. E. Girirajan, Advocate SR No. 73407
- 1 cc to the Government Pleader SR No. 73948

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